FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1944.

INTERNATIONAL UNION OF MINE, MILL, AND SMELTER WORKERS, LOCALS Nos. 15, 17, 107, 108 AND 111, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION,

Petitioners,

VS.

EAGLE-PICHER MINING & SMELTING COMPANY, A CORPORATION, EAGLE-PICHER LEAD COMPANY, A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

No. 337.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUMMARY OF ARGUMENT.

(On Behalf of Respondents Eagle-Picher Mining & Smelting Company, and Eagle-Picher Lead Company.)

JOHN G. MADDEN,
Fidelity Building,
Kansas City, Missouri,

A. C. WALLACE,
Miami, Oklahoma,

H. W. BLAIR,
Tower Building,
Washington, D. C.,

JAMES E. BURKE,
Fidelity Building,
Kansas City, Missouri,

RALPH M. RUSSELL,
Fidelity Building,
Kansas City, Missouri,

Attorneys for Respondents, Eagle-Picher Mining & Smelting Company, and Eagle-Picher Lead Company.

MADDEN, FREEMAN, MADDEN & BURKE,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1944.

INTERNATIONAL UNION OF MINE, MILL, AND SMELTER WORKERS, LOCALS Nos. 15, 17, 107, 108 AND 111, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION,

Petitioners,

VS.

EAGLE-PICHER MINING & SMELTING COMPANY, A CORPORATION; EAGLE-PICHER LEAD COMPANY, A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

No. 337.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUMMARY OF ARGUMENT.

(On Behalf of Respondents Eagle-Picher Mining & Smelting Company, and Eagle-Picher Lead Company.)

FOREWORD.

This proceeding is remarkable in that therein the successful litigants below seek to vacate in part the favorable decree which they joined in inducing the court to

enter. In the interim respondents complied, or sought to comply, therewith, and no restoration of the status quo is possible. The requested modification of the decree would necessarily have a retrospective, and not a prospective, operation, and by compliance rights of respondents have been irretrievably lost Finality of judgment, both by the expiration of the term, and the provisions of the National Labor Relations Act (29 U. S. C. A., Sec. 160, p. 239); *is ignored by petitioners. A final decree can only be vacated at most by pleading and proof satisfying the requirements of a bill of review. Delaware R. R.* v. *Rellstab*, 276 U. S. 1, 72 L. Ed. 439, l. c. 441; *Nachod et al.* v. *Engineering Corp.*, 108 F. 2d 594; *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, l. c. 95; *Bronson* v. *Schulten*, 104 U. S. 410, 26 L. Ed. 797, l. c. 799; *Wetmore* v. *Karrick*, 205 U. S. 141, 51 L. Ed. 745; *Stewart Corp.* v. *National Labor Relations Board*, 129 F. 2d 481, l. c. 483. *The vice underlying every contention of petitioners is the assumption that their request for modification of the decree would result in a decree prospective in nature. The contrary is true. They concede that "the terminal date of the 6-year period of discrimination" was August 23, 1941* (Pet. Br. p. 14). *As a result liabilities under the final decree were fixed and fully accrued upon that date. To accept the theory of petitioners would not be to modify a decree, applicable thereafter in futuro, for prospective operation only, but to vacate, nullify, and set aside a final decree as of the date of its original rendition. Petitioners do not contend that they or the Board complied with the essential requirements of a bill of review; to the contrary they assert that such compliance was unnecessary, that the doctrine of finality of judgment has no application to a final decree in an enforcement proceeding, and that the Board, after the final decree, had at all times plenary authority to vacate or modify that decree without applica-*

tion to the Court for permission to do so, and that, even if permission were sought, the Court was under a mandate to comply with the Board or Union request as a mere automaton. Petitioners ignore the circumstance that that doctrine would compel the delegation by the Court of control over its own processes to an administrative agency. The questions presented here (Pet. Br. p. 2) *were not presented below and are novel. As a result they are not reviewable. U. S. v. McFarland*, 275 U. S. 485, 72 L. Ed. 386; *Dent v. Swilley*, 275 U. S. 492, 72 L. Ed. 390. *Certiorari should therefore be revoked. General Talking Pictures Corp. v. Western Electric*, 304 U. S. 175, l. c. 177, 178, 82 L. Ed. 1273, l. c. 1275; *Helis v. Ward*, 308 U. S. 365, 84 L. Ed. 327, l. c. 329; *Dickinson Industrial Site v. Cowan*, 309 U. S. 382, l. c. 389, 84 L. Ed. 819, l. c. 825. *The factual assumptions indulged in by Board and Union are negatived by the record. The court below properly so found.*

POINT I.

Petitioners are without capacity to prosecute an application for certiorari to review the ruling below upon the Board petition. They were also without capacity to file the motion below to modify or remand the decree. The court below was without jurisdiction to entertain that motion. As a result petitioners cannot seek to review by certiorari the rulings criticized. Amalgamated Utilities Workers v. Consolidated Edison, 309 U. S. 261, 84 L. Ed. 738; National Licorice Company v. National Labor Relations Board, 309 U. S. 350, 84 L. Ed. 799; National Labor Relations Board v. Sunshine Mining Co., 125 F. 2d 757, l. c. 761; National Labor Relations Board v. Thompson, 130 F. 2d 363, l. c. 367; National Labor Relations Board v. Killoren, 122 F. 2d 609, l. c. 612; Greenebaum Tanning Co. v. National Labor Relations Board, 129 F. 2d 487, l. c. 489; Stewart Die Casting Co. v. National Labor Relations Board, 132 F. 2d 801, l. c. 803.

POINT II.

The alleged questions presented by petitioners were not involved in the decision below. That decision was purely factual. As a result it will not be reviewed upon certiorari. Southern Power Co. v. North Carolina Public Service Co. 263 U. S. 508, 68 L. Ed. 413; General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273; United States v. Johnston, 268 U. S. 220, 69 L. Ed. 925; Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922.

POINT III.

The court below did not foreclose the Board from taking any proper administrative action. Its only ruling was that there was an insufficient basis presented either for vacating its final decree or remanding that portion of the decree criticized to an administrative agency for revision. Petitioners' arguments ignore both the doctrine of finality of judgment and of control by the court below over its own judicial processes. General Tobacco Co. v. Fleming, 125 F. 2d 596, l. c. 599; Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364; U. S. v. Swift, 286 U. S. 106, 76 L. Ed. 999; Sistare v. Sistare, 218 U. S. 1, 54 L. Ed. 905; Caples v. Caples, 47 F. 2d 225; Southern Bell Telephone v. National Labor Relations Board, 129 F. 2d 410, l. c. 412; Woolworth v. National Labor Relations Board, 121 F. 2d 658, l. c. 663.

POINT IV.

The Board and petitioners invoked the exercise of the sound discretion of the court below, and cannot complain of that exercise. Plainly the discretion was exercised properly without abuse. The decision below was correct. Board and Union failed to satisfy the requisites of a bill of review, and the decision below is not here reviewable.

Central Bank v. Wardman, 31 Fed. Supp. 685, l. c. 688, 689; Manning v. Insurance Co., 107 Fed. 52; U. S. v. Ali, 20 F. 2d 998; Hart v. Wiltsee, 25 F. 2d 863; Roman v. Alvarez, 30 F. 2d 813, l. c. 814; Chase v. Driver, 92 Fed. 780, l. c. 786; Hill v. Phelps, 101 Fed. 650, l. c. 651-654; Hazel-Atlas Glass Co. v. Hartford-Empire Co., 321 U. S. 238, 88 L. Ed. 936, l. c. 942 and 948, n. 4; Kithcart v. Life Insurance Co., 88 F. 2d 407, l. c. 410; Rothschild v. Marshall, 51 F. 2d 897, l. c. 899; Simonds v. Indemnity Co., 73 F. 2d 412, l. c. 415; Railway v. United States, 106 F. 2d 899, l. c. 902; Sorenson v. Sutherland, 109 F. 2d 714, l. c. 719; Obear-Nester v. Hartford, 61 F. 2d 31, l. c. 34; Southern Bell Telephone v. National Labor Relations Board, 129 F. 2d 410, l. c. 412.

Respectfully submitted,

JOHN G. MADDEN,
Fidelity Building,
Kansas City, Missouri,

A. C. WALLACE,
Miami, Oklahoma,

H. W. BLAIR,
Tower Building,
Washington, D. C.,

JAMES E. BURKE,
Fidelity Building,
Kansas City, Missouri,

RALPH M. RUSSELL,
Fidelity Building,
Kansas City, Missouri,

Attorneys for Respondents, Eagle-Picher Mining & Smelting Company and Eagle-Picher Lead Company.

MADDEN, FREEMAN, MADDEN & BURKE,
Of Counsel.